IN THE SUPREME COURT OF MISSOURI

Economy Forms Corporation	)	
	)	
Respondent	)	
	)	
v.	)	No. SC83385
	)	
J.S. Alberici Construction	)	
	)	
Co., Inc.	)	
	)	
Appellant	)	

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI, DIVISION 10
THE HONORABLE KENNETH M. ROMINES, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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POINTS RELIED ON

I.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the

negligence and fault of EFCO; under Missouri law even a broad indemnity agreement does not create a duty to indemnify against the indemnitee's own fault or negligence unless the indemnity agreement states clearly and unequivocally that the indemnitee's own fault or negligence is included; and the Lease Agreement did not clearly and unequivocally state that Alberici agreed to indemnify EFCO against EFCO's own fault or negligence.

Missouri District Tel. Co. v. Southwestern Bell Tel. Co. (Mo. banc 1935) 93 S.W.2d 19

Kansas City Power & Light Co. v. Federal Construction Corp. (Mo. 1961) 351 S.W.2d 741

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp. (Mo. banc 1993) 854 S.W.2d 371

II.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law an agreement to indemnify against the indemnitee's own fault or negligence must be set forth conspicuously; and the indemnity provisions of the Lease Agreement were not conspicuous.

Burcham v. Procter & Gamble Manufacturing Co. (E.D.Mo. 1993) 812 F.Supp. 947 (Missouri law)

Section 400.1-201(10), RSMo.

Section 407.620, RSMo.

Section 407.673, RSMo.

Section 408.260.2, RSMo

Section 429.012.1, RSMo

Section 432.045.3, RSMo

III.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit sought recovery for work-related injury to Alberici's employee; the Missouri Workers' Compensation Law provides immunity to Alberici against liability to "any person" for injury to its employee; and the Lease Agreement was insufficient to overcome Alberici's statutory immunity under the Missouri Workers' Compensation Law.

Parks v. Union Carbide Corp. (Mo banc 1980) 602 S.W.2d 188, 190

Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598

Section 287.120, RSMo.

IV.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph

14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that under Missouri law EFCO, as a manufacturer, had the duty to indemnify Alberici against products liability for EFCO's products; and the Lease Agreement was insufficient to overcome the obligation imposed on EFCO by law.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp. (Mo. banc 1993) 854 S.W.2d 371

ARGUMENT

Appellant's Substitute Brief previously filed by Alberici is cited herein as "App. Brf." Respondent's Substitute Brief filed by EFCO is cited herein as "Resp. Brf."

Preliminary Matters

EFCO does not dispute that the standard of review herein is de novo.

However, EFCO's brief displays a misunderstanding about the determinative issue in this case. This suit seeks to recover EFCO's defense costs, but the determinative issue is whether Paragraph 14 of EFCO's Lease Agreement imposed on Alberici the legal duty to indemnify EFCO against EFCO's own fault or negligence.

We have demonstrated (App. Brf. pp.17-19) that under Missouri law, Alberici had no duty to defend EFCO against the Stawizynski suit unless Alberici would have been required by paragraph 14 of the Lease Agreement to indemnify EFCO against potential liability for the claims asserted in Stawizynski's petition. Indeed, EFCO cites Missouri authority to the same effect (Resp. Brf. pp. 18-19). We have also pointed out that the claims asserted against EFCO in Stawizynski's petition were based solely on the alleged negligence and products liability of EFCO, not Alberici (App. Brf. pp.20-21) -- a

point that EFCO has never disputed. The inescapable conclusion is that Alberici had no duty to defend EFCO against the Stawizynski suit if Paragraph 14 of the Lease Agreement was insufficient to require Alberici to indemnify EFCO against liability for EFCO's own fault or negligence.

Nevertheless, section I.B. of EFCO's brief is devoted to the contention, raised for the first time before this Court, that Alberici had a duty to defend EFCO against the Stawizynski suit even if the Lease Agreement does not require Alberici to indemnify EFCO against EFCO's own fault or negligence (Resp. Brf. pp. 24-26). In other words, EFCO now contends that Alberici was required to defend against claims that were not covered by Alberici's indemnity obligation. This contention, apparently based on EFCO's misreading of an Illinois Appellate Court decision, is erroneous and unsupportable.

To begin with, the operative language of Paragraph 14 of EFCO's Lease Agreement is that the Lessee shall "indemnify, defend and save harmless the Lessor from any such claims . . . ." Both "indemnify" and "defend" refer to the same claims. As a matter of simple grammar, this language cannot require the Lessee to defend against claims different from those it requires the Lessee to indemnify against.

In addition, EFCO's contention is contrary to settled law. "When determining an insurer's duty to defend, we look to the insurance policy provisions and the allegations of the petition charging liability to the insured [citation omitted]. Unless the facts alleged in the petition come within the coverage of the insurance policy, the insurer has no duty to defend the insured" (McDonough v. Liberty Mutual Ins. Co. (Mo.App.E.D. 1996) 921 S.W.2d 90, 93). Thus, unless the claims alleged against EFCO in Stawizynski's petition are covered by Alberici's indemnity obligation, Alberici has no duty to defend EFCO.

The Texas Supreme Court applied the same principles to squarely reject a contention similar to EFCO's in Fisk Electric Co. v. Constructors & Associates, Inc.

(Tex. 1994) 888 S.W.2d 813. Fisk was a subcontractor of Constructors on a construction project. The subcontract required Fisk to indemnify and defend Constructors "to the fullest extent permitted by law" against all claims, including attorney's fees (id. at 814). An employee of Fisk was injured on the job, and brought a negligence action against Constructors. Constructors, like EFCO, "was not found to be negligent" (id. at 813), and sued Fisk for its costs of defense. The Court held that "Fisk's obligation to pay attorney's fees arises out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney's fees" (id. at 815). The Court further held that Fisk had no duty to indemnify because the subcontract did not expressly provide for indemnification against Constructors' own negligence. In the absence of such express provision, "there is no indemnity for defense costs incurred in connection with a negligence claim irrespective of whether the claim is ultimately proved" (id. at 815-816).

Further, EFCO's contention is not supported by the Illinois decision EFCO cites, McNiff v. Millard Maintenance Serv. Co. (Ill.App. 1 Dist. 1999) 715 N.E.2d 247. In McNiff, an injured worker sued JMB and Millard, alleging separate negligence on the part of each. JMB sought contractual indemnity from Millard. The court held that Millard had no duty to indemnify JMB against liability arising from JMB's own negligence, because the contract failed to satisfy the clear and unequivocal requirement, but Millard did have a duty to defend JMB against those allegations that were based on Millard's negligence. "Millard was obligated to retain attorneys to defend any claims filed against JMB relating to Millard's negligence" (id. at 252). Here, however, there were no claims asserted by Stawizynski against EFCO based on Alberici's negligence (LF v.1 p.66ff.). The McNiff decision did not hold or suggest that Millard was required to defend JMB against any claim based on JMB's own negligence, as would be required to support EFCO's contention. The McNiff case is inapposite.

Thus, the determinative question in this case is whether EFCO's Lease Agreement would have required Alberici to indemnify EFCO if EFCO had been found

liable for the claims alleged in Stawizynski's petition. It is irrelevant whether or not Stawizynski's claims succeeded. The duty to defend is determined prospectively, on the basis of the allegations of Stawizynski's petition, which were directed solely to negligence of EFCO and EFCO's liability as the designer and manufacturer of defective products.

I.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law even a broad indemnity agreement does not create a duty to indemnify against the indemnitee's own fault or negligence unless the indemnity agreement states clearly and unequivocally that the indemnitee's own fault or negligence is included; and the Lease Agreement did not clearly and unequivocally state that Alberici agreed to indemnify EFCO against EFCO's own fault or negligence.

In responding to Alberici's first Point Relied On, EFCO does not dispute two key points: (i) that the "clear and unequivocal" requirement has been upheld in over 19 decisions of this Court and the Missouri Courts of Appeals (cited in App. Brf. pp.23-24), and (ii) that the indemnity provisions of EFCO's Lease Agreement contain no explicit reference to fault or negligence of EFCO, as would be required to satisfy the clear and unequivocal requirement. Thus EFCO effectively concedes that its claim cannot succeed under the existing rule of law established in these 19 decisions.

EFCO therefore begins by simply ignoring the clear and unequivocal requirement. EFCO argues in section I.A. of its brief that the language of Paragraph 14 should be construed to require Alberici to indemnify EFCO against EFCO's own fault and negligence as alleged in the Stawizynski suit. However, in support of this argument, EFCO points only to the dictionary meaning of the broad, general terms of Paragraph 14, such as "exonerate from liability for . . . injury to any persons" and "indemnify . . . from any such claims" (Resp. Brf. pp.19-20). The cases upholding the clear and unequivocal rule make clear that this is precisely the kind of seemingly all-inclusive, but overbroad, language which is "not sufficient to impose liability for the indemnitee's own negligence" (Kansas City Power & Light Co. v. Federal Construction Corp. (Mo. 1961) 351 S.W.2d 741, 745).

EFCO then attempts to circumvent the clear and unequivocal requirement by claiming that the requirement has been eliminated for indemnity agreements between "sophisticated commercial entities" by the decision of the Eastern District in Monsanto Company v. Gould Electronics, Inc. (Mo.App.E.D. 1998) 965 S.W.2d 314) (Resp. Brf. pp. 20-23).

Alberici's opening brief sets forth reasons why this reading of Monsanto is erroneous (App. Brf. pp.47-49), some of which are that Monsanto was decided on unique facts that are not present in this case; the Monsanto Court would have had no authority to change the law established in decisions of this Court, and the same Court that decided Monsanto has rejected EFCO's reading of that case and held in this proceeding that "Monsanto is not contrary to the result reached here" (Slip Opn. p.6).

One point, however, deserves further mention. The Monsanto decision referred to a dictum of this Court contained in a footnote to the opinion in Alack v. Vic Tanny International of Mo., Inc. (Mo. banc 1996) 923 S.W.2d 330, 338 n.4). The footnote referred not merely to sophisticated commercial entities, but to "an agreement negotiated at arm's length between equally sophisticated commercial entities." In an

effort to squeeze this case into the quoted language under both Monsanto and Alack, EFCO has seriously and repeatedly misstated the record by asserting, without citation, that "the indemnity paragraph was contained in a Lease Agreement negotiated at arm's length" (Resp. Br. p.31; see also pp.22,23, 32).

To the contrary, the record conclusively establishes that there were no negotiations between Alberici and EFCO over Paragraph 14 or any of the other boilerplate terms of EFCO's Lease Agreement. Alberici's Motion for Summary Judgment in the trial court incorporated by reference the accompanying Affidavit of Joseph F. Krispin (LF v.1 p.16). The Krispin Affidavit stated "There was no negotiation between Alberici and EFCO over the printed terms" of EFCO's Lease Agreement (LF v.1 p.23). EFCO's response to Alberici's Motion for Summary Judgment did not contradict or deny any of the factual statements in Alberici's motion or the Affidavit, and in fact expressly admitted that "there are no genuine issues of material fact" (LF v.1 p.121). "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion" (ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp. (Mo. banc 1993) 854 S.W.2d 371, 376). Thus, EFCO is estopped from claiming now that the indemnity provisions of EFCO's Lease Agreement were arrived at by negotiation.

EFCO admits that existing Missouri decisions, including Kansas City Power & Light, supra, "stand for the general proposition that 'mere general, broad, and seemingly all-inclusive language in the indemnifying agreement is not sufficient to impose liability for the indemnitee's own negligence,'" the essence of the clear and unequivocal rule (Resp. Brf. p. 27).

In light of this admission, EFCO's contention (Resp. Brf. pp. 27-29) that the indemnity language in Kansas City Power & Light, supra, should have been analyzed by Alberici (and this Court) under some other principle is irrelevant. EFCO makes no similar criticism of the other 18 decisions upholding the clear and unequivocal rule. For

example, EFCO finds no fault with the contract language quoted in Appellant's opening Brief from cases such as Missouri District Tel. Co. v. Southwestern Bell Tel. Co. (Mo. banc 1935) 93 S.W.2d 19 (App. Brf. p.23) and Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598 (App. Brf. p.37), both of which are closely comparable to the language in EFCO's Lease Agreement and would alone illustrate the inadequacy of the Lease Agreement to support EFCO's claim.

EFCO does not dispute, and thus tacitly concedes, that under the 19 Missouri decisions upholding the clear and unequivocal rule, the broad and seemingly all-inclusive language in EFCO's Lease Agreement is not sufficient to impose liability on Alberici for EFCO's fault or negligence. EFCO baldly asserts that its proposed exception for "sophisticated commercial parties" would not be inconsistent with any of these cases (Resp. Brf. p.27); but EFCO makes no attempt to explain how this can be so when all of the decisions of this Court upholding the clear and unequivocal requirement for indemnity agreements have involved sophisticated commercial parties (see App. Brf. p.46).

II.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit was based solely on the negligence and fault of EFCO; under Missouri law an agreement to indemnify against the indemnitee's own fault or negligence must be set forth conspicuously; and the indemnity provisions of the Lease Agreement were not conspicuous.

EFCO's brief does not dispute, and thus concedes, that in order to create an

enforceable contractual duty to indemnify against the indemnitee's own fault or negligence, the provision containing this explicit undertaking must be "conspicuous" in the contract.

EFCO has admitted (see App. Brf. p.30) that the indemnity language of Paragraph 14 is not "in larger or other contrasting type or color," a test of conspicuousness under Missouri's Uniform Commercial Code (Section 400.1-201(10), RSMo). Although EFCO took pains to comply with this statutory test of conspicuousness in the printed warranty disclaimers at the end of its Lease Agreement, it did not do so in the indemnity provisions.

Other Missouri statutes impose other specific requirements for "conspicuousness" of particular contract terms; for example, that they be set out in full in boldface ten-point type (Section 432.045.3, RSMo); in all upper-case boldface ten-point type (Sections 408.260.2 and 429.012.1, RSMo); in boldface fourteen-point type next to the signature line (Section 407.673, RSMo); and in all upper-case boldface eighteen-point type (Section 407.620, RSMo). The indemnity language of EFCO's Lease Agreement fails to satisfy or come close to any of these requirements for conspicuousness.

Nevertheless, EFCO contends in section II.A. of its brief that the indemnity language of Paragraph 14 is conspicuous (Resp. Brf. p.33). EFCO has appended to its Brief (Resp. Brf. pp. A3-A4) what EFCO represents to be a copy of the contract that was at issue in Burcham v. Procter & Gamble Manufacturing Co. (E.D.Mo. 1993) 812 F.Supp. 947, one of the cases in which the Court refused enforcement of indemnity provisions for lack of conspicuousness. However, the comparison harms EFCO's case much more than it helps, because the obvious similarities between the Burcham contract and EFCO's Lease Agreement far outweigh any differences.

In neither contract was the principal subject indemnity. In Burcham, the contract was a printed purchase order prepared by Procter & Gamble; here, it is a printed rental agreement prepared by EFCO. In both contracts, the indemnity language "appears

in small print, on the back of a boiler plate . . . form supplied" by the party claiming indemnification (812 F.Supp. at 948). In both contracts, the indemnity language is "surrounded by unrelated terms and is not highlighted, printed in bold type or otherwise set apart from the other provisions in the contract in order that a contractor . . . would note its inclusion in the contract" (id.). These are the precise facts on which the Burcham Court based its holding that the indemnity clause was "not conspicuous and may not be enforced" (id.).

The sole difference pointed out by EFCO is that Paragraph 14 of EFCO's Lease Agreement starts with the word "LIABILITY"; whereas the indemnity paragraph in the Burcham purchase order had no such title. But the paragraph heading "LIABILITY" does not make the fine-print indemnity language in the paragraph conspicuous, nor does it even serve to alert EFCO's customer that the paragraph may contain indemnity provisions. Paragraph 14 appears under the prominent page heading "WARRANTY TERMS AND CONDITIONS." It would therefore be most logical to conclude that the paragraph heading "LIABILITY" refers to EFCO's liability for its product warranty, rather than an extraordinary liability of the Lessee to indemnify EFCO against its own negligence.

EFCO argues that the conspicuousness requirement should not be applied here because, under Warren v. Paragon Technologies Group, Inc. (Mo. banc 1997) 950 S.W.2d 844, a signatory is presumed to have read and noticed each provision of the contract (Resp. Brf. p.35). A moment's reflection will show that if the rule were this simple, there could be no conspicuousness requirement for any written contract. The requirement for conspicuousness necessarily creates an exception to the general presumption. The effect of the requirement is that even though language is present in a contract stating that a signatory party shall indemnify another against the other's own fault or negligence, if the language is not conspicuous and the signatory is unaware of the provision, the indemnity is unenforceable.

Furthermore, the Paragon decision did not lay down the blanket rule that EFCO claims. In that case, a tenant injured in a slip and fall sued the owner and manager of her apartment for negligence. The defendants pleaded a release clause in their lease as an affirmative defense. This Court stated that such a release must be conspicuous to be enforced, but held that "the court can reach this question only after the parties comply with the applicable pleading and evidence requirements" (950 S.W.2d at 845). The plaintiff had not pleaded the unenforceability of the release as an avoidance of the affirmative defense, and there was no evidence introduced as to whether or not the plaintiff had actually read the release provision. It was only for these reasons that the Court, "in the absence of other evidence," applied the presumption that the plaintiff had read and noticed each provision of the lease she signed (id. at 846). The Court thus did not reach the conspicuousness issue in Paragon. The logical corollary is that if the record had contained evidence that the plaintiff had not read the release, the Court would have considered the conspicuousness issue rather than giving the presumption conclusive effect. The corollary applies here.

In this case, by contrast to Paragon, it is an admitted fact in evidence that Mr. Krispin did not read Paragraph 14 or the other boilerplate printed terms in the back of EFCO's Lease Agreement (LF v. 1 p.23). This is not, as EFCO implies (Resp. Brf. p.36), merely a "claim" made in Alberici's brief; it is a factual statement made under oath in Alberici's motion for Summary Judgment (LF v.1 p.18) and neither denied nor disputed in EFCO's response to the motion. Under the Paragon decision, the presumption that a signatory has read and noticed every provision of the contract would not overcome the requirement for conspicuousness with this fact established in the evidence.

EFCO's final argument on the second Point borders on the frivolous. It is that since Alberici tendered EFCO's demand for defense of the Stawizynski suit to Alberici's insuror for response, rather than responding directly, Alberici must have believed it was obligated to defend EFCO (Resp. Brf. pp.36-37). The logical non

sequitur is obvious, as is the irrelevance of Alberici's belief at the time.

III.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that the Stawizynski suit sought recovery for work-related injury to Alberici's employee; the Missouri Workers' Compensation Law provides immunity to Alberici against liability to "any person" for injury to its employee; and the Lease Agreement was insufficient to overcome Alberici's statutory immunity under the Missouri Workers' Compensation Law.

The gist of Appellant's third Point Relied On is that under decisions of the this Court and the Courts of Appeals, the clear and unequivocal requirement is applied even more rigorously in cases claiming indemnity against liability for injury to the indemnitor's employee, because of the added force of the legislative policy of employer immunity from such liability under the Missouri Workers' Compensation Law, Section 287.120, RSMo (App. Brf. pp.34-39). EFCO instead invites the Court to relax the clear and unequivocal requirement in such cases.

EFCO cites only the Monsanto decision in support of this suggestion (Resp. Brf. p.39). Monsanto was not an employer-employee situation, and thus did not involve the policy of the Workers' Compensation Law. EFCO cites no case or other authority holding that in an employer situation, the explicit language requirements set forth in Parks v. Union Carbide Corp. (Mo. banc 1980) 602 S.W.2d 188 and its progeny may be disregarded.

Under the Parks line of cases, the express agreement required to avoid the Workers' Compensation bar would be an explicit agreement by Alberici to indemnify EFCO, in so many words, against EFCO's own fault and negligence, not a general agreement to defend EFCO against all liability for injury during Alberici's use or possession.

Though EFCO's brief attempts to distinguish Parks and two other cases in the Parks line on factual grounds, EFCO studiously ignores Bonenberger v. Associated Dry Goods Co. (Mo.App.E.D. 1987) 738 S.W.2d 598, a case essentially on all fours with the case at bar, as shown in Alberici's opening brief at pages 37-38.

EFCO's statement that Paragraph 14 of its Lease Agreement "specifically requires Alberici to defend and indemnify for any and all claims, including those based on the negligence of EFCO" (Resp. Brf. p.39, emphasis added) is plainly wrong and seriously misleading. It is precisely because Paragraph 14 does not specifically state that Alberici shall indemnify against claims based on the negligence of EFCO that the Lease Agreement is insufficient, under Parks and Bonenberger, to overcome Alberici's immunity under the Workers' Compensation Law.

IV.

The Trial Court erred in granting summary judgment to Plaintiff EFCO, because the Trial Court misapplied the law to the facts in construing Paragraph 14 of the Lease Agreement to require Alberici to indemnify EFCO against the Stawizynski suit, in that under Missouri law EFCO, as a manufacturer, had the duty to indemnify Alberici against products liability for EFCO's products; and the Lease Agreement was insufficient to overcome the obligation imposed on EFCO by law.

The thrust of Alberici's fourth Point Relied On is that the common law of Missouri would ordinarily require EFCO, as the manufacturer, to indemnify Alberici, as a downstream supplier of EFCO's products, from products liability claims asserted by the ultimate user Stawizynski. The policy embodied in this common-law principle (like the policy of employer immunity embodied in the Workers' Compensation Law) is an additional reason why EFCO's Lease Agreement cannot be construed to impose on Alberici a duty to indemnify EFCO against EFCO's own fault or negligence, in the absence of exceptionally clear and explicit language referring to EFCO's fault or negligence.

EFCO's response is the tautology that since the Lease Agreement requires Alberici to indemnify EFCO against Stawizynski's claims, EFCO's common-law duty is irrelevant (Resp. Brf. p.41). The logical flaw of this response is obvious. EFCO assumes that the Lease Agreement imposes such duty on Alberici -- the very matter at issue -- in order to argue that EFCO's common-law indemnity obligation should be disregarded in construing the Lease Agreement.

EFCO's suggestion that this Court may not consider legal arguments that were not made before the trial court has no validity in this appeal. EFCO cites Plank v. Union Electric Co. (Mo.App.E.D. 1995) 899 S.W.2d 129, a case involving procedural objections to a motion that were not raised in the trial court. The issue here is the substantive legal validity of the trial court's grant of summary judgment, a matter which this Court reviews de novo (ITT Commercial Finance Corp., supra). For that reason, an appellate court may determine the propriety of summary judgment "on an entirely different basis that that posited at trial" (ITT, 854 S.W.2d at 388).

Conclusion

EFCO's Brief does not present any authority, or reasoned argument, demonstrating that the indemnity provisions of EFCO's Lease Agreement satisfied the

requirements laid down in settled Missouri law either for clear and unequivocal language, or for conspicuousness, or for overcoming Alberici's employer immunity under the Workers' Compensation Law. For each of these reasons, as a matter of law, EFCO's Lease Agreement did not create in Alberici any duty to defend or indemnify EFCO against EFCO's own fault or negligence as alleged in the Stawizynski suit.

EFCO's claim would require this Court to overrule existing law in all three lines of authority. As demonstrated in Alberici's opening brief, such drastic changes in settled law would be unwarranted, and would be especially inappropriate in this case (App. Br. pp.40-56).

The summary judgment awarded to EFCO by the trial court was therefore in error, and should be reversed with direction to enter summary judgment in favor of Appellant Alberici.

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	)	
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	)	
v.	)	No. SC83385
	)	
J.S. Alberici Construction Co., Inc.	)	
	)	
Defendant/Appellant	)	

CERTIFICATE OF SERVICE

David G. Millar, being duly sworn, on his oath states that on the ____ day of May, 2001, he mailed two copies of the foregoing brief by U.S. Mail, postage prepaid, properly addressed to: Mr. Gerard F. Hempstead, Behr, McCarter & Potter, P.C., 7777 Bonhomme, Suite 1810, St. Louis, Missouri 63105.

_____
David G. Millar

Subscribed and sworn to before me this ____ day of May, 2001

My commission expires:_____.

_____
Notary Public

CERTIFICATE REQUIRED BY SPECIAL RULE No. 1(c)

The undersigned certifies as follows:

(1) To the best of the knowledge, information and belief of the undersigned, formed after an inquiry reasonable under the circumstances, the claims, requests, demands, objections, contentions, and arguments set forth in the attached Brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the claims and other legal contentions therein are warranted by existing law; the allegations and other factual contentions have evidentiary support; and any denials of factual contentions are warranted on the evidence.

(2) The attached Brief complies with the limitations contained in Special Rule No. 1.

(3) The attached Brief contains 5,220 words, according to the word count of the word processing program used to prepare it.

(4) The floppy disk filed herewith has been scanned for viruses and is virus-free.

_____

David G. Millar #19456

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